Supreme Court, U.S.
FILED

941083 DEC 19 1994

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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN THOMAS KOEN,
Petitioner.

v.

UNITED STATES of AMERICA,
Respondent.

On Writ Of Certiorari To
The Eighth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

William M. Ravkind
Counsel of Record
RAVKIND & RAVKIND, P.C.
8117 Preston Rd., Suite 520
Dallas, Texas 75225
(214) 265-7151

Attorney for Petitioner

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

25 pp

QUESTION PRESENTED

1. A constructive amendment to an indictment is considered prejudicial per se. Is there an exception to this long established principle if the prosecutor changes his theory during trial to include the defendant's description of the facts which differ materially from those presented by him to either the grand jury or the petit jury?

2. Does the government give adequate notice to either the defendant or the Court where the indictment merely alleges a conspiracy beginning at a time unknown, ending at a date certain, without identifying any co-conspirators or describing any overt acts, where a bill of particulars is denied and where in his final rebuttal argument the prosecutor tells the jury that they can find the defendant guilty of the conspiracy alleged in the indictment based upon the defendant's own testimony presenting a factual scenario completely different from that presented to either the grand jury or the trial jury by the prosecutor and his witnesses?

LIST OF PARTIES

(1) Petitioner, John Thomas Koen

(2) Respondent, the United States of America

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2. Providing adequate notice to a criminal defendant is so fundamental that the Eighth Circuit's affirmance of a conviction where the defendant received insufficient notice to prepare a defense and the Court insufficient notice to make a critical evidentiary ruling should not be allowed to stand because the likelihood of a similar miscarriage of justice is very real. . . . 11

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No._____

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JOHN THOMAS KOEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, John Thomas Koen, respectfully requests that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (No. 94-1426) whose opinion is herein sought to be reviewed, was rendered on August 9, 1994, and is set forth at Appendix A (1a-4a).

JURISDICTION

The judgement of the United States Court of Appeals for the Eighth Circuit was entered on August 9, 1994. A timely petition for rehearing was denied on September 20, 1994 (Appendix B (5a). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides, in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .".

2. The Sixth Amendment to the Constitution of the United States provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

STATEMENT

1. Introduction

In 1887 this Court made clear that the Constitution of the United States guarantees that a criminal defendant will be tried only on charges presented in a grand jury indictment. *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887). Seventy-three years later this Court once again reaffirmed this precious Constitutional right. *United States v. Stirone*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 251 (1960).

If this Court allows the Eighth Circuit's affirmance of Thomas Koen's conviction this longstanding Constitutional right will be seriously compromised.

In addition, the Sixth Amendment has consistently been interpreted to require that a criminal defendant be given sufficient notice to prepare a defense and, if necessary, to plead former jeopardy. The Eighth Circuit refused to even

address John Thomas Koen's complaint that neither he nor the Court were given sufficient notice of the conspiracy charged in the indictment to allow him to prepare a defense and to allow the Trial Court to determine what evidence was extraneous to the conspiracy charged in the indictment.

Absent review by this Court the Eighth Circuit's decision guarantees that a citizen's right to be charged by a grand jury and a citizen's right to receive adequate notice of the charges being made against him will be seriously compromised.

2. Factual and Procedural Background

The Defendant, John Thomas Koen, was indicted in a two-count indictment as follows:

> **Count I**
>
> . . . *Beginning at a time unknown* to the Grand Jury and continuing through on or about February of 1989, in the Eastern District of Missouri and elsewhere,
>
> John Thomas Koen . . .
>
> the defendant herein, and other diverse persons both known and unknown to the Grand Jury, did unlawfully, knowingly and intelligently, combine, conspire, confererate, and agree together to commit the following offenses against the United States:
>
> (1) To unlawfully, knowingly and intentionally, possess cocaine with the intent to distribute it, in violation of Title 21, United States Code, Section 841 (1)(1); and/or

(2) To unlawfully, knowingly and intentionally distribute cocaine, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Section 846 and punishable under Title 21, United States Code, Section 841(b)(1)(A)(ii)(IV). [emphasis added]

COUNT IV

. . . On or about late December 1988, in the Eastern District of Missouri and elsewhere,

John Thomas Koen . . .

the defendant herein, knowing that property involved in a financial transaction affecting interstate commerce, to wit, the transportation of funds from the State of Missouri to the State of Texas, represented the proceeds of some form of unlawful activity; did conduct or attempt to conduct, and cause to conduct or attempt to conduct, such financial transaction, which, in fact, involved the proceeds of specified unlawful activity as defined in Title 18, United States Code, Sections 1956(c)(7)(A) and 1961(1)(D), to wit: the felonious buying, selling and otherwise dealing in cocaine and did so with the intent to promote the carrying on of said specified unlawful activity.

All in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i).

Prior to trial, a Bill of Particulars asking for a more complete description of the conspiracy was filed but denied.

The first trial ended in a mistrial when the jury was unable to reach a verdict. The prosecution's theory of the case as described in his opening and closing argument and attested to by all of his witnesses involved Koen's conduct beginning in April/May 1988 and ending in February 1989. According to the prosecutor and his witnesses, Koen as introduced to Jimmy Vitale and Al Giuffreda in April/May 1988 by Tommy Armstrong, a mutual friend. Vitale and Giuffreda were looking for someone to supply them with cocaine for distribution in St. Louis. Armstrong identified Koen as a Florida dope dealer and a possible supplier.

According to the prosecutor and his witnesses, in April/May 1988 Armstrong affected the introduction and, thereafter, in furtherance of the agreement reached at that time Koen delivered approximately 11 kilos of cocaine to Vitale and Giuffreda in St. Louis. The prosecution offered the testimony of one Michael Doty, a Dallas dope dealer, who claimed that he had supplied Koen with approximately 3 kilos of the cocaine that was subsequently delivered to Vitale and/or Giuffreda in St. Louis. According to the prosecutor and his witnesses, the conspiracy terminated when Giuffreda was arrested in February 1989 after approximately 11 kilos had been delivered beginning in June 1988.

Koen took the stand in his own defense and testified to a totally different factual scenario. According to Koen, he had known Vitale since 1986, meeting him in a bar that Koen managed. Koen described their relationship as bettor (Koen) and bookie (Vitale). According to Koen, by September 1987 he had become so indebted to Vitale that he could not pay his gambling debts. Koen testified that Vitale insisted upon payment and that because he was afraid of Vitale's friend,

Giuffreda, he agreed to act as a mule and transport cocaine from Florida to Vitale in St. Louis. This agreement was reached in early October 1987.

Koen testified that by the end of October, after making three deliveries of 2-1/2 kilos, he told Vitale that he was through. Vitale was upset, and Koen, because he was afraid of Giuffreda, agreed to introduce Vitale to a Dallas man he knew to be a cocaine dealer by the name of Michael Doty. According to Koen, in late October or early November 1987, he arranged for Doty to meet with Vitale in St. Louis. Koen testified that the meeting took place but, because he was not privy to the conversation between the two dope dealers, he does not know if an agreement was struck. Finally, Koen testified that his only involvement with Vitale in 1988 was placing bets. He denied that in April/May 1988 he had agreed to and, thereafter, delivered cocaine to either Vitale or Giuffreda. Both Vitale and Doty had earlier testified that they had never met. Doty also denied ever coming to St. Louis.

As stated above, the first trial ended in a mistrial when the jury was unable to reach a verdict.

Thereafter, the second trial began. The prosecutor's presentation of the evidence and his theory of conviction was almost identical to the first trial. "Almost identical", save and except, in his final rebuttal the prosecutor told the jury that they could find Koen guilty of the conspiracy charged in the indictment based solely of Koen's testimony that he had introduced Vitale to Doty in October/November 1987. Previously, Koen's counsel had told the jury that Koen's conduct in 1987 had nothing to do with the conspiracy charged in the indictment.

During an extensive deliberation the jury asked the trial judge to resolve this dispute between the parties and tell them whether or not they could consider Koen's testimony that he acted as a mule in 1987 in resolving the conspiracy charge.

Koen asked the Court to instruct the jury, as a matter of law, that his 1987 conduct, as described by him, was extraneous to the conspiracy charged in the indictment. The Court acknowledged that because the conspiracy was alleged to have begun at a time unknown, the jury inquiry presented "a delicate point". The prosecution urged the Court to refer the jury back to the charge which contained a multiple conspiracy instructions. The Court denied Koen's request and referred the jury back to the charge.

Thereafter, the jury reached a verdict finding Koen not guilty of the allegation contained in Court IV, the December 1988 delivery, but guilty of the conspiracy charged in Court I.

3. The Decision Below

On appeal to the Eighth Circuit Koen argued that his conviction should be reversed for several reason. First, Koen argued that the trial judge abdicated his responsibility by refusing to tell the jury that Koen's conduct in 1987 was extraneous to the conspiracy charged in the indictment, the essential element of which was clearly the alleged April/May 1988 agreement between Koen, Vitale and Giuffreda. Koen argued that the meeting between Vitale and Doty in October/November 1987 could not conceivably have been found by the grand jury and, in any event, there was no testimony that Vitale and Doty ever reached an agreement. Indeed, both men denied ever meeting, with Doty going so far as to deny ever being in St. Louis.

Koen also urged the Eighth Circuit to consider that even if the indictment could possibly be interpreted to charge the 1987 conduct described only by him, he had not been adequately notified that the conspiracy charged in the indictment included his conduct in October/November 1987. Koen reasoned that the only notice he had been given that the indictment charged a conspiratorial agreement being effected in 1987 was when the prosecutor gave his final rebuttal argument and Koen pointed out that if he had been so notified he certainly would not have testified in a way that, according to the prosecutor, amounted to a confession.

The Eighth Circuit specifically rejected Koen's former argument reasoning that Koen, not the prosecutor, introduced evidence of illegal conduct in 1987 and because the indictment identified the beginning of the conspiracy at a time unknown, Koen's argument was flawed. The Eighth Circuit failed even to consider that the essential element of a conspiracy is an agreement and clearly the grand jury never considered any 1987 agreement between Vitale and Doty as the essential element of the conspiracy charged in Count I.

Finally, the Eight Circuit refused to even speak to Koen's complaint that he had been denied adequate notice of the charges.

REASONS FOR GRANTING THE WRIT

By allowing the jury to consider evidence of the possible agreement between Vitale and Doty in October/November 1987, the District Court not only constructively amended the indictment but also shifted the responsibility of defining the conspiracy charged in the indictment from the Court to the jury.

1. The Fifth Amendment to the Constitution guarantees that a criminal defendant will be tried only on charges presented in a grand jury indictment. Implicit in this Constitutional guarantee is the longstanding principal of our criminal justice system that the charges contained in an indictment may not be broadened or amended except by the grand jury itself. *Stirone v. United States*, 361 212, 215-217, 80 S.Ct. 270, 272-273, 4 L.Ed 252 (1960); *Ex Parte Bain*, 121 U.S. 1, 10, 7 S.Ct. 781, 786, 30 L.Ed. 849 (1887).

Such amendments need not be explicit, rather they may be implied or constructive. *Stirone*, 361 U.S. 217-18, 80 S.Ct. at 273-74. Indeed, the prosecutor's change in position during the trial can be sufficient to work a constructive amendment of the indictment. The only question is whether the prosecutor changed his theory during the trial so as to urge the jury to convict on a basis broader than that charge by the grand jury. *United States v. Doucet*, 994 F.2d 169, 172 (5th Cir. 1993).

The right to have criminal charges found by a grand jury is to insure that a citizen be charged with a serious crime only by a group of his fellow citizens acting independent of either the prosecuting attorney or the Court. *Stirone*, 361 U.S. at 270, 80 S.Ct. at p. 273.

This protection the grand jury was designed to afford was defeated in the instant case when the jury was allowed to convict Koen of a conspiracy based upon an agreement neither presented to nor found by the grand jury that indicted him.

The Eighth Circuit, in affirming Koen's conspiracy conviction, recognized that an amendment to the indictment occurs when the jury is permitted to convict the defendant

upon a factual basis that effectively modifies an essential element of the crime charged. However, what the Circuit Court ignored is that the most essential element of a criminal conspiracy is the underlying agreement and, in this case, the jury was permitted to consider the possible agreement reached between Vitale and Doty in October/November 1987 when resolving the question of Koen's participation in the conspiracy charged in the indictment. It is beyond cavil that any agreement other than the April/May 1988 agreement was not and could not have been presented to or found by the Grand Jury. Every prosecution witness took issue with Koen's version of the facts.

The Eighth Circuit, in summarily rejecting Koen's claim that there was a constructive amendment of the indictment, stated as follows:

> "We fail to see how the essential elements of the indicted offense were altered by the prosecutor or court in the present case. The indictment did not state a date upon which the conspiracy began. It was the defense, not the government, that introduced the evidence of Koen's activities prior to 1988. The judge instructed the jury regarding multiple conspiracies as requested by the defense and admonished the jury to follow his instructions in response to the jury's question."

If this Court accepts this reasons, are we not allowing prosecutors and courts to constructively amend indictments charging a criminal conspiracy if the evidence of an agreement other than that sponsored by the prosecutor is introduced by the defendant rather than the government? This question is rhetorical. If an agreement is an essential element of a criminal conspiracy, which it is, and the jury in

the instant case was permitted to convict Koen based upon the possible October/November 1987 agreement between Vitale and Doty rather than the April/May 1988 agreement between Koen, Vitale and Giuffreda, the prosecutor constructively amended the indictment.

The fact that the trial judge referred the jury back to the charge that contained a multiple conspiracy instruction is irrelevant. Limiting the evidence the jury may consider to the conspiracy charged in the indictment is the duty of the Court, not the jury. *See id.* at 217, 80 S.Ct. at 273. By referring the jury to the charge, the District Court improperly shifted the burden of defining the conspiracy charged in the indictment from the Court to the jury.

2. Providing adequate notice to a criminal defendant is so fundamental that the Eighth Circuit's affirmance of a conviction where the defendant received insufficient notice to prepare a defense and the Court insufficient notice to make a critical evidentiary ruling should not be allowed to stand because the likelihood of a similar miscarriage of justice is very real.

It is horn book law that a criminal defendant must be given sufficient notice of the charges against him to allow preparation of a defense and, if necessary, to plead former jeopardy. Similarly, the Court must be given sufficient notice of the charges in order to determine what conduct, if any, is extraneous to the offense charged in the indictment. *United States v. Chandler*, 858 F.2d (5th Cir. 1988).

Thomas Koen was twice tried after the jury in the first trial failed to reach a verdict. The indictment provided little to no description of the details of the conspiracy in which he was alleged to have participated. A request for a

Bill of Particulars was denied. However, because there were two trials, Koen believed he understood the prosecution's case.

As explained by the prosecuting attorney and as attested by his witnesses in both trials, Koen agreed with Vitale and Giuffreda in April/May 1988 to deliver cocaine to St. Louis, Missouri and, in furtherance of the scheme, Koen actually delivered approximately 11 kilos between June 1988 and February 1989.

In both trials Koen took the stand in his own defense and described a completely different factual scenario where in October of 1987 he was pressured by Vitale to deliver cocaine from Florida to St. Louis in order to repay gambling debts. Koen admitted to 3 deliveries in October 1987 of 2-1/2 kilos. But, according to him, the illicit arrangement terminated in late October or early November of 1987 when the bookmaker, dope dealer, Vitale was introduced to Michael Doty by Koen. According to Koen, he was not involved in any illegal activity in 1988 or 1989 and did not know if Doty and Vitale reached an agreement.

The second trial was, in the main, a mirror image of the first trial. The prosecutor and his witnesses retold their version of the facts all having to do with the April/May 1988 illegal agreement and the subsequent illegal activities in furtherance thereof. Koen continued to deny that he had entered into any illegal agreement in April/May 1988 or that he had engaged in any illegal conduct in 1988 or 1989. He repeated his claim that the only agreement he made was in October of 1987, when he agreed to introduce Doty to Vitale, and the only illegal activity he was involved in also

occurred during October 1987. Koen, once again, described how he terminated his relationship with Vitale after introducing Doty to Vitale in late October or early November 1987.

The only difference between the two trials occurred during the prosecutor's closing rebuttal when he told the jury that Koen's admission that he had introduced Vitale to Doty was sufficient to include him in the conspiracy charged in the indictment. During jury deliberation, it became apparent that the jury did not understand the scope of the conspiracy charged and asked the Court if Koen's admission that he acted as a mule in October, 1987 could be considered by them in resolving the conspiracy count. During the chamber conference, the Court acknowledged the jury inquiry presented "a delicate point".

Obviously, the conspiracy charged in the indictment was not based on any October, 1987 agreement or conduct and the jury should have been told so. However, because the indictment contained no description of the conspiracy which was alleged to have begun at a time unknown, the Court simply referred the jury back to the charge.

The charge contained a multiple conspiracy instruction but inclusion of such an instruction in no way absolved the Court from its duty to determine extraneous conduct; which is what happened. The Court simply referred the jury back to the charge leaving to them the determination of relevancy. Thereafter, the jury returned its verdict finding the Defendant not guilty of the only illegal conduct alleged to have occurred in 1988 but guilty of a conspiracy which the prosecutor had argued could include conduct in October/November 1987. Thus, not only was Koen provided insufficient notice to know what illegal conspiracy in which he was alleged to have participated but, in addition, it is likely that he was

convicted of participating in a conspiracy neither presented to nor found by the grand jury. Finally, it is abundantly clear that the Court was not given sufficient notice to respond to the jury's question relating to the relevancy of Koen's October/November 1987 conduct.

It cannot be seriously argued that the notice provided to the Defendant and to the Court in this case was adequate. The only real issue is whether or not the injustice visited on John Thomas Koen will likely recur so as to justify the granting of the writ.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

WILLIAM M. RAVKIND
Counsel of Record
RAVKIND & RAVKIND
8117 Preston Rd., Suite 520
Dallas, Texas 75225
(214) 265-7151

Attorney for Petitioner

December 19, 1994

APPENDIX A

UNITED STATE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1426

United States of	*	
of America,	*	Appeal from the United
Appellee,	*	States District Court
	*	for the
v.	*	Eastern District of
	*	Missouri.
John Thomas Koen,	*	[PUBLISHED]
Appellant.	*	

Submitted: July 25, 1994

Filed: August 9, 1994

Before FAGG, WOLLMAN, and BEAM, Circuit Judges.

PER CURIAM.

A grand jury indicted John Thomas Koen on one court of conspiracy to distribute and/or possess with intent to distribute cocaine and one count of money laundering. His first trial ended in a mistrial when the jury was unable to agree on a verdict. The jury in his second trial found him guilty on the conspiracy court and not guilty on the money laundering court. Koen argues on appeal that he was convicted on conduct not found by the grand jury. We affirm.

The grand jury charged:

> Beginning at a time unknown to the Grand Jury and continuing through on or about February of 1989, in the Eastern District of Missouri and elsewhere, John Thomas Koen . . . and other diverse persons both known and unknown to the Grand Jury, did unlawfully, knowingly and intelligently, combine, conspire, confederate, and agree together to commit [the offenses of distribution and/or possession with intent to distribute cocaine].

Government witnesses James Vitale and Alfred J. Giuffreda, Jr. testified to a conspiracy in which Koen delivered cocaine to them beginning in mid-1988 and ending in February 1989. Koen testified in his own defense that in order to pay a gambling debt he owed to Vitale, he delivered cocaine to Vitale and Giuffrida several times in October 1987. Koen testified that he told Vitale he would not make any future deliveries, that Vitale asked him to find another cocaine source, and that he introduced Vitale to Michael Doty as a new source for cocaine.

The government argued in closing that the jury should convict based on the government's evidence. It added that Koen's own testimony also could implicate him in the conspiracy alleged in the indictment because, although Koen's deliveries in October 1987 would constitute actions taken as part of a *separate conspiracy*, Koen's introduction of a source for cocaine to Vitale would make him part of the conspiracy that continued until 1989.

The court had previously read the indictment to the jury and instructed the jury that "[e]ven if the evidence in the

case shows the defendant was a member of some conspiracy, but that this conspiracy is not the single conspiracy charged in the indictment, you must acquit defendant Koen. Unless the government proves existence of the single overall conspiracy described in the indictment beyond a reasonable doubt as to defendant Koen, you must acquit him."

During deliberations, the jury sent a note to the court asking: "When we are considering the indictment, number one, is the time [Koen] acted as a mule and readily admits to functioning as a mule a time frame we can consider, or is the time frame only December of 1988?" The court answered: "In response to your question, you are to be guided by my instructions." The jury then returned a verdict of guilty on the conspiracy count.

Koen argues that his right to a fair trial was infringed because the jury was permitted to convict him of an offense other than that charged in the indictment. Specifically, he argues that the grand jury could not have charged him with illegal conduct in 1987 because he did not testify before the grand jury and he was the only person who testified at trial to the 1987 conduct. He argues that the government's closing argument and the district court's refusal to advise the jury that the 1987 conduct had not been found by the grand jury amounted to a constructive amendment of the indictment because it permitted the jury to convict him of the conspiracy count based on the 1987 conduct.

"An amendment occurs 'when the essential elements of the offense set forth in the indictment are altered, either actually or in effect, by the prosecutor or the court after the grand jury has passed upon them.'" *United States v. Huntsman*, 959 F.2d 1429, 1435 (8th Cir.), *cert. denied*, 113 S.Ct. 201 (1992) (quoting *United States v. Begnaud*, 783

F.2d 144, 147 n.4 (8th Cir. 1986)). Because an amendment usurps the constitutionally guaranteed role of the grand jury, it is reversible error per se. *See id.*

We fail to see how the essential elements of the indicted offense were altered by the prosecutor or court in the present case. The indictment did not state a date upon which the conspiracy began. It was the defense, not the government, that introduced the evidence of Koen's activities prior to 1988. The judge instructed the jury regarding multiple conspiracies as requested by the defense and admonished the jury to follow his instructions in response to the jury's question.

We also do not perceive a fatal variance. A variance occurs when the charging terms are left unaltered but the evidence offered at trial proves facts different from those alleged in the indictment. *Id.* A variance is cause for reversal only if the variance actually prejudiced the defendant. *Begnaud*, 783 F.2d at 148. Koen was not prejudiced in his defense: any variance that occurred between the evidence at trial and the facts alleged in the indictment originated from Koen's own testimony.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94-1426EMSL

United States of America, Appellee,	*	Order Denying Petition
	*	for Rehearing and
v.	*	Suggestion for
	*	Rehearing En Banc
John Thomas Koen, Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 20, 1994

Order Entered at the Direction of-the Court:

/s/ Michael E. Gus

Clerk, U.S. Court of Appeals, Eighth Circuit